STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2011
v	No. 294567 Oakland Circuit Court
JASON STEPHEN SZYDLEK, Defendant-Appellant.	LC No. 2009-225938-FH

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530, unlawful imprisonment, MCL 750.349b, and assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 10 to 30 years' imprisonment for each conviction, the sentences to be served concurrently. Defendant appeals as of right. We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant argues that he was denied effective assistance of counsel because defense counsel failed to investigate a defense and failed to call a witness. We disagree.

Defendant preserved these issues when he moved this Court for a remand for an evidentiary hearing. However, this Court denied defendant's request for a remand. *People v Szydlek*, unpublished order of the Court of Appeals, entered December 15, 2010 (Docket No. 294567). Because no *Ginther*[1] hearing has been held, our review of defendant's claims is limited to the facts on the record. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-part test enunciated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 US at 687-688. Second, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. The defendant bears the burden of establishing the factual predicate for the claim. *Carbin*, 463 Mich at 600.

Defendant claims that counsel was ineffective for failing to investigate his cellular telephone records, which he claims would show, contrary to the testimony of the victim, Daniel Mavity, that there was a trip to White Lake and Detroit during the evening of March 7, 2009. However, there is no record evidence suggesting that defense counsel failed to investigate the cellular telephone records or that defendant made telephone calls from White Lake and Detroit. Moreover, whether defendant and Mavity traveled to White Lake and Detroit has no relevance to the question of defendant's guilt. While the cellular telephone records may have been relevant to the credibility of Mavity and defendant, it is not reasonably probable that the admission of the records would have altered the outcome of defendant's trial. Accordingly, the record does not establish that counsel was ineffective for failing to investigate defendant's cellular telephone records.

Defendant also claims that counsel was ineffective for failing to make arrangements for Dr. Theodore Engelmann, his personal physician, to testify at trial. According to defendant, Engelmann would testify that defendant was physically incapable of dragging Mavity. The record evidence establishes that Engelmann was subpoenaed by counsel to testify as a defense witness, that Engelmann failed to appear at trial, and that the trial court, when counsel could not guarantee that Engelmann would appear, decided to finish the trial. Defendant fails to specify how counsel's actions in attempting to secure the appearance of Engelmann were deficient. Moreover, Engelmann's failure to appear at trial did not deprive defendant of a substantial defense. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Three witnesses testified that defendant suffers from back problems, is often in pain, and has trouble walking and lifting objects. Accordingly, the record evidence does not support the claim that counsel was ineffective for failing to call Engelmann as a witness.

II. OFFENSE VARIABLES

Defendant argues that the trial court erroneously scored four offense variables (OVs). Specifically, defendant claims that the trial court erred in scoring 50 points for OV 7 for the unarmed robbery offense, 15 points for OV 8 for the unlawful imprisonment offense, five points

for OV 10 for the assault with intent to do great bodily harm offense, and 25 points for OV 13 for all three offenses.[2] We disagree.

We review de novo the interpretation and application of the sentencing guidelines. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). However, a sentencing court has discretion in determining the number of points to be scored, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and we will uphold a scoring decision for which there is any evidence in the record to support. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

We need not address defendant's challenges to the scoring of OV 8 for the unlawful imprisonment offense and OV 10 for the assault with intent to do great bodily harm offense. When a defendant is sentenced to concurrent sentences, a sentencing information report need only be prepared for the crime of the highest crime class. *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). The sentencing guidelines do not apply to the lesser class crimes. *Id.* at 130. Unarmed robbery and unlawful imprisonment are class C felonies, MCL 777.16q; MCL 777.16y, while assault with intent to do great bodily harm is a class D felony, MCL 777.16d. Here, the trial court scored the guidelines for the unarmed robbery offense, which was a crime of the highest crime class. Defendant's arguments regarding OV 8 and OV 10 do not challenge the trial court's scoring of the offense that was scored but, rather, the offenses for which the court was not required to, and did not, score the guidelines. Indeed, defendant concedes that the trial court properly scored 15 points for OV 8 and 5 points for OV 10 for the unarmed robbery offense. Because neither the unlawful imprisonment offense nor the assault with intent to do great bodily harm offense are the offense on which the guidelines were scored, we need not address defendant's claims that OV 8 and OV 10 were erroneously scored.

We find no error in the trial court's scoring of OV 7 at 50 points. Fifty points may be scored for OV 7 if the defendant treated a "victim with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Here, after defendant discovered that Mavity reclaimed his belongings from defendant's dresser, defendant tied Mavity's hands to his legs, punched him in the face, and choked him until he lost consciousness. Defendant gagged Mavity and dragged him to the bathroom. He filled the bathtub with water, and repeatedly dunked Mavity's head under the water. Defendant asked Mavity where the "things" were at, and the Mavity ultimately answered that the "stuff" was in his coat pockets. When defendant finally let Mavity leave the apartment, Mavity's belongings were missing from his coat. This evidence supports the trial court's finding that defendant subjected Mavity to excessive brutality during the commission of the unarmed robbery. The trial court did not abuse its discretion in scoring 50 points for OV 7.

We also find no error in the trial court's scoring of OV 13 at 25 points. Twenty-five points may be scored for OV 13 where the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). In scoring OV 13, a

[2] These arguments are also presented by defendant in his standard 4 brief.

trial court is to count "all crimes within a 5-year period, including the sentencing offense." MCL 777.43(2)(a). Defendant was convicted of unarmed robbery, unlawful imprisonment, and assault with intent to do great bodily harm, all of which are crimes against a person. MCL 777.16d; MCL 777.16q; MCL 777.16y. Concurrent convictions may be used to score OV 13. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001) (holding that the defendant's four convictions for child sexually abusive activity, which resulted from four photographs the defendant took of two girls during one day supported a 25-point score for OV 13). Accordingly, the three crimes that defendant committed against Mavity are sufficient to support the trial court's scoring of OV 13. The trial court did not abuse its discretion in scoring OV 13 at 25 points.

III. DEFENDANT'S STANDARD 4 BRIEF

In his standard 4 brief, defendant raises several claims of prosecutorial misconduct. We find no merit to any of the claims.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Because defendant failed to object to the alleged misconduct, we review the claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

Defendant first argues that the prosecutor suppressed exculpatory evidence, e.g., Mavity's criminal record. However, defendant has not established that the prosecutor improperly suppressed Mavity's criminal record under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Specifically, defendant has not demonstrated that he could not have obtained the criminal record himself through reasonable diligence. *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009).

Defendant next claims that the prosecutor improperly presented false evidence. Prosecutors may not knowingly present false evidence, and, if they do, they must correct it. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). However, a prosecutor is not compelled to disbelieve his own witness and correct the witness's testimony simply because certain testimony is contradicted by another witness. *Id.* at 278-279. A defendant is entitled to a new trial only where there is a reasonable likelihood that false testimony could have affected the judgment of the jury. *Id.* at 279-280. Here, the prosecutor did not present any false testimony. Nothing in the record supports defendant's contention that Detective MacDonald testified falsely about not performing any testing on items taken from defendant's apartment. And, while Allen Doyon's testimony was inconsistent with Mavity's testimony about whether they approached defendant's apartment days after the robbery, the prosecutor was not compelled to disbelieve Doyon's testimony or correct it because of one minor inconsistency. Moreover, the inconsistency related to a collateral matter; whether Mavity and Doyon approached defendant's apartment was of no consequence to the issue of whether defendant committed the charged crimes. There is no reasonable likelihood that Doyon's testimony affected the judgment of the jury.

Defendant argues that the prosecutor improperly cross-examined him about the alleged extortion note left by Mavity and a prior conviction. With regard to the prosecutor's cross-examination about the alleged extortion note, the questioning was proper. The inquiry was responsive to defendant's direct examination testimony. *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976). The inquiry was also probative of defendant's credibility, which is always a material issue during trial. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). With regard to the prosecutor's questioning of defendant about his past involvement with illegal drugs, the questioning was improper. Defendant did not open the door to this issue during direct examination, and the questioning was not proper under the rules of evidence for purposes of impeachment, MRE 608(b); MRE 609(a), or proving character, MRE 404(b); MRE 405(b). Nonetheless, defendant fails to establish that the improper questioning affected his substantial rights. *Cox*, 268 Mich App at 451.

Defendant's final prosecutorial misconduct argument is that the prosecutor improperly argued during closing arguments that Mavity's testimony was corroborated by Doyon's testimony and that defendant had not produced corroborating evidence, particularly the alleged extortion note. The prosecutor's argument that Mavity's testimony was corroborated by Doyon's testimony was proper. The prosecutor opined that defendant's testimony was very different from Mavity's and argued that the jury needed to consider whose testimony was corroborated in making its credibility determination. The prosecutor then explained how Doyon's testimony about Mavity's injuries and demeanor was consistent with Mavity's testimony. A prosecutor may comment on evidence and make arguments about the credibility of witnesses where there is conflicting testimony and the defendant's guilt or innocence depends on the veracity of the witnesses. *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). The prosecutor's arguments that defendant's testimony was not corroborated and that the alleged extortion note did not exist were also proper. When a defendant advances a theory of the case as an alternative to the theory advanced by the prosecution, a prosecutor may point out the weakness in the defendant's case by commenting on the defendant's failure to produce corroborating evidence. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995); *People v Jackson*, 108 Mich App 346, 351-352; 310 NW2d 238 (1981). Indeed, a prosecutor may argue that a defendant testified untruthfully. *People v Coddington*, 188 Mich App 584, 603; 470 NW2d 478 (1991).

Defendant also raises numerous claims of ineffective assistance of counsel in his standard 4 brief. We also find no merit to these claims.

Defendant argues that counsel was ineffective for not disclosing a conflict of interest. According to defendant, counsel did prosecutorial work for the local district court, where Mavity had received leniency in multiple criminal cases. There is, however, no record evidence of any conflict of interest. Consequently, defendant has failed to prove the factual predicate of the claim. *Carbin*, 463 Mich at 600.

Defendant asserts that counsel was ineffective for failing to adequately investigate Mavity. He claims that counsel should have investigated Mavity's criminal record, extortion threats, medical records, and work records. Again, there is no record evidence to support the claim that counsel's investigation was inadequate. Defendant has failed to establish the factual predicate of the claim. *Carbin*, 463 Mich at 600.

Defendant argues that counsel was ineffective for failing to object when the prosecutor questioned him about his past drug activities. Although we concluded that the prosecutor improperly questioned defendant about his prior drug activities, counsel's failure to object did not prejudice defendant. Defendant fails to show that, but for counsel's failure to object, there is a reasonable probability that the outcome of his trial would have been different. *Strickland*, 466 US at 694.

Defendant contends that counsel was ineffective because he failed to object to defendant being sentenced as an habitual offender, third offense. Defendant claims that he should have been sentenced as an habitual offender, second offense, because his two prior felony convictions were obtained under a plea agreement and, therefore, only count as one offense. In support, defendant cites *People v Tucker*, 181 Mich App 246, 258-259; 448 NW2d 811 (1989), where this Court held that prior convictions obtained under a single plea bargain count as only one offense for purposes of the habitual offender statutes. However, defendant's reliance on *Tucker* is misplaced. Our holding in *Tucker* relied upon the Supreme Court's decision in *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987), which has been overruled by *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008). Indeed, our holding in *Tucker* is inconsistent with the Supreme Court's holding in *Gardner*, 482 Mich at 68, that "Michigan's habitual offender laws clearly contemplate counting *each* prior felony conviction separately." Pursuant to *Gardner*, the trial court properly sentenced defendant as an habitual offender, third offense, MCL 769.11, because defendant had two prior convictions for delivery of a schedule four controlled substance in 1994. Counsel was not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next argues that counsel was ineffective for not objecting to certain hearsay statements testified to by Steve Arnold. Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless an exception applies. MRE 802. Contrary to defendant's assertion, Arnold did not give testimony about the observations of his wife. He explained that after receiving a telephone call from his wife about Mavity, he went to the intersection of Parview and Andersonville. Arnold also testified that Mavity told him that he had been tied up, beaten, and had things stolen from him at Greens Lake Apartments. Although Mavity's statements were hearsay, they were admissible under MRE 803(2) as an excited utterance. The statements related to a startling event, and they were made while Mavity was under the stress caused by the event. MRE 803(2). Counsel was not ineffective for failing to make futile objections. *Fike*, 228 Mich App at 182.

Defendant next claims that counsel was ineffective for failing to object to the prosecutor's use of false testimony, for failing to object when the prosecutor questioned him about the alleged extortion note, and for failing to object to the prosecutor's improper arguments during closing arguments. However, as already concluded, the record evidence fails to establish that the prosecutor presented any false testimony. Likewise, the prosecutor's questions about the alleged extortion note were proper, as were his arguments during closing arguments. Counsel was not ineffective for failing to make futile objections. *Fike*, 228 Mich App at 182.

Defendant claims that counsel was ineffective for failing to call Steve Conkle as an alibi witness. The record contains no evidence that Conkle would testify as defendant claims. Absent

such evidence, we will not second-guess counsel's decision not to call Conkle as a witness. See *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (2010).[3]

Defendant asserts that counsel failed to adequately cross-examine Mavity, MacDonald, and Dr. Dragovic. Decisions concerning the cross-examination of the witnesses are a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). A review of the record does not establish that counsel's cross-examination of the witnesses was unreasonable or unsound. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

Defendant's final argument in his standard 4 brief is that the cumulative effect of the errors denied him a fair trial.[4] There are not multiple errors to aggregate. The only error concerned the prosecutor's cross-examination of defendant regarding defendant's past drug involvement. This single error was not "so seriously prejudicial" that it denied defendant a fair trial. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Affirmed.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

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[3] Defendant also claims that counsel was ineffective for failing to call a medical expert. But, as already explained, counsel's actions concerning the failure of Engelmann to appear at trial were not deficient.

[4] Defendant complains of other errors committed by the trial court, including whether the trial court promised the jury that it would hear from Engelmann. Because these claims of error were not included in the statement of questions presented, we decline to address them. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).